"Children are Different": Constitutional Values and Justice Policy

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This essay explores the importance for Eighth Amendment jurisprudence and for juvenile crime regulation of Miller v. Alabama *(2012) and two earlier Supreme Court opinions rejecting harsh sentences for juveniles. It argues that the Court has broken new ground in defining juveniles as a category of offenders who are subject to special Eighth Amendment protections. In* Miller *and in* Graham v. Florida *(2010) particularly, the Court has applied to juveniles' non-capital sentences the rigorous proportionality review that, for adults, has been reserved for death sentences. The essay then turns to the implications of the opinions for juvenile crime policy, arguing that the Court has embraced a developmental model of youth crime regulation and elevated this approach to one that is grounded in constitutional values and principles. This approach represents a forceful repudiation of the punitive law reforms of the late twentieth century, when the relevance of adolescents' developmental immaturity to justice policy was either ignored or rejected. The opinions offer four key lessons for lawmakers. The first is that juvenile offenders are different from and less culpable than adults and should usually be subject to more lenient criminal sanctions. The second lesson is that decisions to subject juveniles to adult prosecution and punishment should be "unusual" and individualized—made by a judge in a transfer hearing and not through categorical legislative waiver. The third lesson is that sanctions should focus on maximizing young offenders' potential for reform. The final lesson is that developmental science can guide and inform juvenile crime regulation in useful ways. These four lessons, formulated by our preeminent legal institution and embodying constitutional values, are likely to have a profound influence on the future direction of youth crime regulation.*

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Three times in the past seven years the Supreme Court has held that imposing harsh criminal sentences on juvenile offenders violates the Eighth Amendment prohibition of cruel and unusual punishment. Most recently, *Miller v. Alabama*[1] (2012) prohibited the mandatory imposition of the sentence of life without parole [LWOP] on a juvenile convicted of homicide. This opinion followed *Roper v. Simmons*[2] (2005), in which the Court rejected the imposition of the death penalty for a crime committed by a juvenile, and *Graham v. Florida*[3] (2010), holding that no minor could be sentenced to LWOP for a nonhomicide offense. In these opinions, the Court has broken new ground in Eighth Amendment doctrine, creating a special status for juvenile offenders. Just as importantly, the Court's constitutional approach to these sentencing challenges powerfully reinforces an emerging regulatory approach to juvenile criminal activity and promises to influence its future direction. With increasing clarity, the Court has announced a broad principle grounded in developmental knowledge that "children are different"[4] from adult offenders and that these differences are important to the law's response to youthful criminal conduct. To be sure, the Court's description of adolescent offenders as "children" exaggerates their immaturity in ways that may generate resistance.[5] Nonetheless, this powerful statement represents a sound repudiation of distorted stereotypes of young criminals that dominated in the 1990s and implicitly challenges the punitive laws adopted during that period as offensive to constitutional values.

The Eighth Amendment opinions offer two consistent messages—that juveniles who commit offenses are less culpable than their adult counterparts and that they are more likely to reform. These conclusions are based on a proportionality analysis that draws on behavioral and neurobiological research to delineate the attributes of adolescence that distinguish teenage offending from adult criminal activity: these traits include adolescents' propensity for taking risks without considering future consequences; their vulnerability to external influences, particularly of peers; and their unformed characters.[6] The transient nature of these developmental influences is also important, because it suggests that juveniles are

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1 132 S. Ct. 2455 (2012).

2 543 U.S. 551 (2005).

3 130 S. Ct. 2011 (2010).

4 *Miller*, 132 S. Ct. at 2470.

5 Both the majority and the dissent in the juvenile opinions assume that adolescents must be classified either as children or as fully responsible adults. More accurately, young offenders belong in an intermediate category of individuals who are less culpable than their adult counterparts, but who bear responsibility for their offenses. *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 123–39 (2008). Although the Court clearly understands the nature and extent of the developmental differences between adolescent and adult offenders, its description of young offenders as "children" perpetuates a rhetorical mischaracterization that has had a polarizing effect on public discourse, generating outrage among hard-line critics. *Id.* at 120–23.

6 *See infra* Part I.D.

likely to desist from involvement in criminal activity as they mature; thus they are less likely than their adult counterparts to be "incorrigible" criminals. This scientific evidence, in the Court's view, creates a sound foundation for its new principle. This principle is now embedded in Eighth Amendment doctrine and will inevitably be invoked in future constitutional challenges to criminal punishment of juveniles.

The Court has created a special status for juveniles through doctrinal moves that had little precedent in its earlier Eighth Amendment cases. In its willingness to find severe adult sentences to be excessive for juveniles, the Court elevated the prominence of proportionality, setting aside the deference to legislatures that is a strong theme in modern Eighth Amendment law and molding constitutional doctrine in a new direction. First, the Court applied to the non-capital sentence of LWOP the rigorous proportionality review previously reserved for the death penalty, categorically prohibiting the sentence for nonhomicide offenses[7] and mandating an individualized hearing before it could be imposed for homicide.[8] Moreover, its judgment that LWOP was unconstitutionally harsh as applied to juveniles was not based on substantial evidence of a national consensus supporting this conclusion—the objective measure that aims to preserve legislative prerogative even in death penalty cases.[9] Instead, the Court relied almost exclusively on its developmentally-informed proportionality analysis, brushing aside the complaint by the dissenting Justices in *Graham* and *Miller* that many state statutes authorized the contested sentences.[10]

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[7] The Court has prohibited the imposition of the death penalty for offenses other than intentional killing and for certain categories of offenders, such as mentally retarded offenders and juveniles. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty as punishment for the rape of a child); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that execution of mentally retarded individuals violates the Eighth Amendment); Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty was grossly disproportionate to the crime of rape).

[8] Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion) (prohibiting mandatory imposition of death penalty and requiring that defendant be evaluated individually, including evaluating mitigating factors). In evaluating whether non-capital adult sentences are excessive, the Court has required "gross disproportionality," a standard adopted from Justice Kennedy's concurrence in *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion). *See, e.g.*, Ewing v. California, 538 U.S. 11, 23 (2003) ("The proportionality principles in our cases distilled in Justice Kennedy's concurrence guide our application of the Eighth Amendment . . . ."). The gross disproportionality standard is almost never met. *See, e.g., id.* at 30 (life sentence under three strikes statute for third felony involving theft of a golf club is not grossly disproportionate); Lockyer v. Andrade, 538 U.S. 63 (2003). The Court before *Miller* held that the prohibition of a mandatory sentence only applied to the death penalty and not to non-capital sentences. *See Harmelin*, 501 U.S. at 1006.

[9] The Court has emphasized the need to review legislative enactments and jury sentencing outcomes as "objective indicia that reflect the public attitude toward a given sanction." Gregg v. Georgia, 428 U.S. 153, 173, 181 (1976); *see also Atkins*, 536 U.S. at 324.

[10] *See infra* Part I.D.

Despite the Court's emphatic announcement that "children are different" from adults, it is hard to predict future developments in Eighth Amendment jurisprudence as applied to juveniles. But youth advocates will find reasons for optimism in the Court's strong endorsement in *Miller* of the importance of considering youth and immaturity in sentencing decisions involving juveniles. Its seemingly gratuitous admonishment that sentences of LWOP should be "uncommon"[11] and rarely imposed may ultimately result in the categorical abolition of this sentence for juveniles, as Chief Justice Roberts and Justices Thomas and Alito predict in dissenting opinions.[12] Just as intriguing, and with more far reaching implications, is the Court's insistence that the features of adolescence that reduce the culpability of young offenders are not crime specific—that they were as relevant to homicide in *Miller* as to nonhomicide offenses in *Graham*.[13] Implicit in this generalization is a broader principle that the same attributes of adolescence that mitigate the culpability of the youths whose crimes the Court has reviewed reduce the blameworthiness of juveniles' criminal choices generally.

Whether the Court will apply this broader principle as a constitutional restraint on the sentencing of juveniles is uncertain; but even if the Court extends *Miller* no further, the policy ramifications of these opinions are likely to prove substantial. The decisions embody a set of constitutional values mandating fair treatment of young offenders. They also draw on an understanding of juvenile crime and of the justice system's appropriate response that offers several key lessons for lawmakers: that juvenile offenders are different from and less culpable than adults and should usually be subject to different treatment; that decisions to subject juveniles to adult prosecution and punishment should be "unusual" and individualized; that sanctions should focus on maximizing young offenders' potential for reform; and that developmental science can inform juvenile crime regulation in useful ways.[14] These four lessons, formulated by our preeminent legal institution, are likely to have a profound influence on the future direction of youth crime regulation.

Lawmakers today are rethinking punitive policies that were adopted in a climate of fear and hostility toward juvenile offenders in the late twentieth century.[15] This new wave of reform recognizes that retaining juveniles in a separate system where they receive developmentally appropriate dispositions is more likely to promote both fairness and efficient crime reduction than policies

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[11] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[12] In his dissent, Chief Justice Roberts speculates, "the Court's gratuitous prediction [that LWOP for juveniles should be uncommon] appears to be nothing other than an invitation to overturn life without parole sentences . . . ." *Miller*, 132 S. Ct. at 2481 (Roberts, C.J., dissenting).

[13] *Id.* at 2465 (majority opinion).

[14] See discussion of these lessons, *infra* Part II.B.

[15] *See* SCOTT & STEINBERG, *supra* note 5, at 94–117 (2008) (describing moral panics of the 1990s and their impact on law reform).

that ignore differences between juveniles and adults.[16] The recent Supreme Court opinions reinforce this developmental approach and elevate its stature to one grounded in constitutional principle—a message that is likely to resonate powerfully with policymakers. Following a long period in which the relevance to criminal punishment of differences between juvenile and adult offenders was either ignored or denied, the recent Supreme Court opinions signal forcefully that policies that ignore these differences offend constitutional values.

The essay will proceed in two parts. Part I will focus on *Miller* and the earlier juvenile sentencing opinions, arguing that the Court has indeed created a special status for juvenile offenders in Eighth Amendment doctrine. Part II will explore the implications for juvenile crime regulation of these opinions, setting the opinions in the political and legal context of late twentieth and early twenty-first century juvenile crime regulation and then exploring the lessons the opinions offer for lawmakers.

I. CREATING A SPECIAL CONSTITUTIONAL STATUS FOR JUVENILE OFFENDERS

At first blush, *Miller v. Alabama* appears to be a narrow decision, simply establishing a procedural requirement before juveniles can be sentenced to LWOP. But this Part shows that such a reading is misleading and that *Miller* is at least as important as the Court's earlier opinions in creating a special status for juvenile offenders under the Eighth Amendment. In combination with *Graham*, *Miller* represents an important extension of Eighth Amendment doctrine into new territory. The Court applied safeguards against excessive punishment of juveniles that are far more rigorous than those it has applied to the sentencing of adults even (arguably) in the death penalty context.[17] Moreover, the constitutional principle announced in *Miller*—"children are different"—is likely to have a far reaching impact beyond the decision's modest holding.

The two cases that were joined in *Miller*[18] presented the Court with several options aside from simply upholding the petitioners' sentences or rejecting LWOP for juveniles altogether. Both petitioners were fourteen years old at the time they committed their crimes, so the Court might have found LWOP to be cruel and unusual punishment as applied to younger juveniles.[19] This was the approach that the Court adopted when it first considered a challenge to the juvenile death penalty in the 1980s. In two opinions, the Court found the death penalty unconstitutional

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[16] *See generally id.* at 226–29.

[17] *See infra* notes 63–70 (discussing *Graham* and *Miller*'s seeming abandonment of the objective measure of excessive punishment under the "evolving standard of decency" test).

[18] The two state court cases were *Jackson v. Norris*, 378 S.W.3d 103 (Ark. 2011) and *Miller v. State*, 63 So.3d 676 (Ala. Crim. App. 2010).

[19] In their brief, Petitioners argue that the Court could "discern a satisfactory basis for [prohibiting LWOP for juveniles below] one of several different ages" above the age of fourteen. Brief for Petitioner at 61, Jackson v. Hobbs, 132 S. Ct. 548 (2011) (No. 10-9647).

under the Eighth Amendment as applied to fifteen-year-old offenders,[20] but not as applied to sixteen- and seventeen-year-olds.[21] Alternatively, the Court might have prohibited the sentence of LWOP for youths who did not intend to kill. Kuntrell Jackson, whose case was joined with that of Evan Miller, was not the trigger man in the video store hold up that resulted in the clerk's death. He stood outside as the crime unfolded and there was no evidence that he intended to kill the victim.[22] Justice Breyer in concurrence would have prohibited the sentence of LWOP without evidence of such intent,[23] but the majority did not base its holding on this distinction. Instead, the Court focused on the mandatory nature of the sentence. Both the Alabama and Arkansas statutes required the sentencing court to impose LWOP on defendants convicted of murder. The Court held that this harsh sentence could only be imposed on a juvenile after the youth had the opportunity to produce evidence of mitigation.[24]

Because its holding was limited to this procedural requirement, *Miller* appears more modest in its reach than the two earlier juvenile sentencing decisions. In *Roper*, the Court categorically rejected the death penalty as unconstitutionally excessive punishment for a crime committed by a juvenile. *Graham* followed suit by holding that no minor could be sentenced to LWOP for a nonhomicide offense. *Miller*, in contrast, simply prohibited a mandatory sentence of LWOP for homicide, requiring an individualized inquiry as to whether the sentence is appropriate. In theory, every youth charged with homicide in a state in which the sentence is authorized (including Kuntrell Jackson) could receive LWOP after the required hearing.

Nonetheless, for several reasons, *Miller* is a far more powerful statement of how juveniles should be dealt with in the justice system than its narrow holding might suggest. First, in strong language, the Court made clear that it expected the

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[20] Thompson v. Oklahoma, 487 U.S. 815, 835 (1989) (holding that the Eighth Amendment prohibits execution of defendant convicted of committing murder when he was fifteen years old).

[21] Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (execution for crimes committed by sixteen- or seventeen-year-olds does not violate Eighth Amendment).

[22] Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012) (describing Jackson's offense). Miller in contrast intentionally killed the victim of his homicide, repeatedly hitting him with a baseball bat, and saying, at one point, "I am God, I've come to take your life." *Id.* at 2462.

[23] *Id.* at 2475–77 (Breyer, J., concurring). Justice Breyer's position was a natural extension of the *Graham* analysis, in which the Court (and Justice Roberts in concurrence) emphasized that the juvenile who did not intend to kill was less culpable than one who did. Justice Breyer's concurrence was also consistent with the Court's reasoning in *Enmund v. Florida* in which the Court rejected the death penalty for defendants convicted of felony murder who neither killed nor intended to kill the victim. 458 U.S. 782 (1982).

[24] The Court does not clarify whether a separate hearing is required before LWOP can be imposed, as it would be in the death penalty setting, in which defendant can introduce mitigating evidence. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). It is possible that the defendant's ability to contribute mitigating evidence to be incorporated into the probation report might be deemed sufficient.

sentence of LWOP to be "uncommon";[25] only the rare juvenile will deserve this sentence. The dissenters recognized that this stern admonition potentially might become a self-fulfilling prophesy.[26] Second, *Miller* made explicit a theme that the Court began to develop in *Graham*—that juveniles represent a special category for Eighth Amendment purposes. In evaluating whether LWOP for juveniles violates "the evolving standards of decency that mark the progress of a maturing society,"[27] the Court applied to juveniles facing LWOP what might be called "proportionality analysis with teeth," previously reserved for the review of death sentences. Moreover, the Court in *Graham* and *Miller* found the challenged sentence to be constitutionality deficient even without a demonstration that it objectively violated national sentencing norms—a measure required (at least ostensibly) even in death penalty cases.[28] Indeed, as the dissenters argued, it would be difficult to argue that statutes imposing mandatory LWOP on juvenile murderers violated these objective norms, given that such statutes were in force in twenty-nine states prior to *Miller*.[29] To an extraordinary extent, the Court relied on its own developmentally-based proportionality analysis in concluding that the sentence was excessive. I will argue that, notwithstanding the dissenting Justices' protests, this analysis provided a solid and objective basis for the Court's conclusion that LWOP is an excessive sentence because of juveniles' reduced culpability. Finally, *Miller* is important because its proportionality analysis supports a general mitigation principle to be applied to adolescent criminal choices, with implications extending far beyond the sentence of LWOP.

A. *LWOP: An "Uncommon" Sentence*

The Court in *Miller* appears to have been somewhat conflicted about the reach of the opinion. On the one hand, the majority emphasized that it was only creating a procedural requirement that must precede the imposition of LWOP on a juvenile—allowing the youth to introduce mitigating evidence of immaturity; a

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[25] *Miller*, 132 S. Ct. at 2469 ("But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

[26] Justice Thomas argues in his dissent that the Court's decision "may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed." *Miller*, 132 S. Ct. at 2486 (Thomas, J., dissenting).

[27] In *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion), Chief Justice Warren defined the standard for determining a punishment is "cruel" under the Eighth Amendment. Because the words "cruel" and "unusual" from the Amendment are "not precise" and "their scope is not static", Chief Justice Warren concluded that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of maturing society."

[28] *Id.*; *See* Atkins v. Virginia, 536 U.S. 451 (2002) (standard applied to find use of death penalty for retarded persons unconstitutional).

[29] *Miller* challenged the statutes of twenty-nine states that imposed mandatory LWOP for defendants convicted of murder. 132 S. Ct. at 2478 (Thomas, J., dissenting).

mature and particularly culpable youth could be sentenced to LWOP.[30] Perhaps even more suggestive of a modest aim, the Court declined to apply the logic of *Graham* to Jackson's felony murder. In prohibiting LWOP for nonhomicide offenses, *Graham* emphasized the reduced culpability of young offenders whose crimes involved no intent to kill another person.[31] But *Miller* does *not* hold that LWOP would always be inappropriate for the youth convicted of felony murder absent proof of an intent to kill the victim.

The Court complicated *Miller*'s modest ambition, however, by emphatically (and gratuitously, a critic might say) underscoring that it expected the sentence of LWOP to be "uncommon" given the diminished culpability of youth. The Court repeated its earlier admonition in *Roper* and *Graham* that it was extraordinarily difficult to distinguish in adolescence the youth whose crime was a product of "transient immaturity" from the "rare juvenile" whose crime reflects "irreparable corruption."[32] This difficulty, and the resulting risk that some immature youths might receive harsh sentences, justified categorical bans in the earlier opinions—even as the Court acknowledged that some (unusual) youths might deserve the proscribed sentences.[33] In *Miller*, the possibility of error led the Court to issue a stern warning to sentencing courts and juries that LWOP was constitutionally permissible only in unusual cases of mature and culpable juveniles, implying that more frequent use would be unacceptable.[34]

The implications of this warning were not lost on the dissenting Justices. Chief Justice Roberts noted correctly that "uncommon" is a synonym for "unusual" in Eighth Amendment parlance; he predicted that the next step would be a categorical bar of the sentence of LWOP for juveniles.[35] Justice Thomas pointed out that sentencers and reviewing courts were likely to take the Court's warning to heart and refuse to impose LWOP on juveniles convicted of homicide. The resulting infrequency of this sentence might ultimately become the basis for a future categorical ban.[36] This scenario is plausible, although the Court's warning

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[30] Thus the Court deflected the criticism of Justice Alito, who, in dissent, challenged the holding by offering the case of a seventeen and a half year old who bombed a mall, killing several people. *Id.* at 2487 (Alito, J., dissenting). Justice Kagan responded that under the required procedure, this juvenile might well receive a sentence of LWOP. *Id.* at 2469 n.8 (majority opinion).

[31] The Court in *Graham* noted, ". . . when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Graham v. Florida, 130 S. Ct. 2011, 2027 (2010).

[32] *Miller*, 132 S. Ct. at 2469.

[33] Roper v. Simmons, 543 U.S. 551, 572 (2005); *Graham*, 130 S. Ct. at 2026–27 (quoted in *Miller*, 132 S. Ct. at 2469).

[34] *Miller*, 132 S. Ct. at 2469. A student author argues (sensibly) that the Court's presumption that the vast majority of juvenile offenders are immature justifies shifting the burden of proof, requiring the state to demonstrate the absence of diminished culpability. *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 176, 286 (2012).

[35] *Miller*, 132 S. Ct. at 2481 (Roberts, J., dissenting).

[36] *Id.* at 2486 (Thomas, J., dissenting)

will only have the influence that the dissenters feared if lawmakers embrace the broader lessons for juvenile crime regulation embodied in these opinions—a subject to which I will return.

B. *Expanding the Eighth Amendment Boundary*

1. A Proportionality Analysis "with Teeth"

Miller is an important case because it makes explicit a theme that the Court began to develop in *Graham*: that juveniles represent a very special category for Eighth Amendment purposes. They are a class of offenders who are entitled to protections when they face a sentence of LWOP that adults receive only when facing a death sentence. In rejecting the mandatory imposition of LWOP and finding it to be a presumptively excessive punishment for juveniles, the Court departed from its well-established response to Eighth Amendment claims involving non-capital sentences.

To demonstrate how *Miller* and *Graham* cases break new ground in Eighth Amendment jurisprudence, a little doctrinal background may be helpful. The modern Court has adopted a two-track approach to reviewing the constitutionality of criminal sentences under the Eighth Amendment, reviewing death sentences far more rigorously than non-capital sentences.[37] The mantra "Death is different"[38] is embedded in Eighth Amendment doctrine. Death sentences have long been subject to an independent assessment by the Court to be certain that the criminal law's harshest sanction is not disproportionate punishment, given the circumstances of the offense and attributes of the offender.[39] The Court has imposed procedural safeguards to ensure that the capital punishment is proportionate to the offense, including the requirement that a death sentence cannot be mandatory, and that the defendant must be allowed to introduce mitigating evidence to persuade the sentencer that he does not deserve the most severe sentence.[40] Further, on occasion, the Court has held the death penalty to be disproportionate as applied to

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[37] *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (describing and critiquing the two-track approach under Eighth Amendment doctrine used to review capital and non-capital sentences).

[38] *Id.* at 1146.

[39] *Id.*

[40] *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) (striking down mandatory capital statutes because "the fundamental respect for humanity underlying the Eighth Amendment" requires individual review of the circumstances of the offender and offense prior to delivering a capital sentence); *see also* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (rejecting a semi-mandatory capital sentencing scheme because sentencers must "not be precluded from considering [mitigating factors] . . .the defendant proffers as a basis for a sentence less than death")

a category of offenders, such as mentally retarded persons[41] or juveniles.[42] It has also prohibited the imposition of the death penalty for particular crimes that it deems to be less blameworthy than intentional killing. Thus the death penalty cannot be imposed as punishment for rape[43] (including rape of a child[44]) or felony murder where the defendant was not the actual killer and had no proven intent to kill.[45] These crimes, the Court has concluded, are simply not sufficiently blameworthy to warrant the most severe punishment.

But the modern Court has declined to undertake meaningful proportionality review of non-capital sentences. Although, in theory, a sentence found to be "grossly excessive"[46] could be overturned, the Court has emphasized that a successful challenge would be "exceedingly rare."[47] In recent years, it has not overturned an adult non-capital sentence on proportionality grounds.[48] For example, a divided Court upheld a life sentence under California's three strikes law of a man whose third offense involved the theft of a golf club.[49] The Court has justified its deferential stance as an effort to avoid encroaching on legislative judgments through "subjective" evaluations of whether sentences are excessive.[50]

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[41] Atkins v. Virginia, 536 U.S. 304 (2002).

[42] The Court first restricted the death penalty for juveniles aged fifteen and younger in *Thompson v. Oklahoma*, emphasizing that youthful immaturity reduces culpability. 487 U.S. 815, 835 (1988). However, a year later the Court upheld the death penalty for juveniles aged sixteen and seventeen. Stanford v. Kentucky, 492 U.S. 361, 380 (1989). In *Roper v. Simmons*, 543 U.S. 551, 553 (2005), the Court revisited the juvenile death penalty two years after the ruling in *Atkins*, 536 U.S. (2002), holding it to be unconstitutional under a proportionality analysis the death penalty for all juveniles.

[43] Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty was grossly disproportionate to the crime of rape).

[44] Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty as punishment for the rape of a child).

[45] Enmund v. Florida, 458 U.S. 782 (1982) (holding that the Eighth Amendment does not permit the death penalty for a defendant who aids or abets a felony which results in a murder by others, when the defendant did not intend or attempt the murder himself).

[46] Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (plurality opinion).

[47] *Id.* at 1001 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

[48] The most recent opinion rejecting a non-capital sentence on proportionality grounds was Solem v. Helm, 463 U.S. 277, 299–300 (1983) in which the Court overturned a mandatory life sentence for an offender's seventh non-violent felony (writing a non-account check for $100).

[49] Ewing v. California, 538 U.S. 11 (2003) (upholding life sentence); *see also* Lockyer v. Andrade, 538 U.S. 63, 70 (2003) (denial of a petition for a writ of habeas corpus while upholding a life sentence for three petty thefts, the third of which was the theft of video tapes worth $70).

[50] *See* Rummel v. Estelle, 445 U.S. 263, 272, 275 (1980). The Court declined to apply the proportionality analysis from capital cases to a non-capital recidivism statute, highlighting the difference between the death penalty and term of years sentences. The Court noted that objectivity is possible in analyzing whether the death penalty is excessive in a particular case because it could "draw a 'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction . . . this line was considerably clearer

On its view, death can readily be distinguished from other sentences, but there is no objective basis for determining that a particular term-of-years sentence is disproportionate as punishment for a particular crime.[51] Accordingly, any conclusion that a sentence is excessive necessarily would amount to a subjective judgment by the Justices. Moreover, the Court has assumed that a sentence can be justified for purposes of proportionality review under preventive as well as retributive theories of punishment. Thus a sentence that might be excessive under conventional retributive theory could stand because it serves a deterrent purpose.[52] Not surprisingly, the Court has upheld a mandatory life sentencing scheme for adult offenders, observing that there is no "requirement of individualized sentencing in noncapital cases."[53]

Graham and *Miller* make clear that, for purposes of Eighth Amendment review of non-capital sentences (at least LWOP), juveniles are entitled to greater protection than adults. The Court in these opinions set aside its typical deference to legislatures and applied constraints and protections for juveniles subjected to LWOP that previously were reserved to the death penalty context. For example, *Graham* represents the only occasion on which the Court has categorically banned a sentence other than death on Eighth Amendment grounds. *Miller* required a procedural protection for juveniles that adults only receive when facing the death penalty, holding that the sentence of LWOP cannot be mandatory and that a youth convicted of murder must be allowed to introduce mitigating evidence.[54]

In these opinions, the Court based its judgment that LWOP was excessive for juveniles on the same proportionality analysis that was at the heart of *Roper*. In fact, as I suggest below, this developmentally-grounded rationale for treating juvenile offenders more leniently than adults is perhaps even more central to the outcomes in the LWOP cases than in *Roper*.[55] The Court also underscored the robustness of the proportionality analysis in these later opinions by emphasizing that the scientific evidence relevant to evaluating the criminal choices of juveniles

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than would be any constitutional distinction between one term of years and a shorter or longer term of years."

[51] *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (finding no basis for concluding that a twenty-five year sentence violates the Eighth Amendment but a fifteen year sentence does not (citing *Solem*, 463 U.S. at 294)).

[52] *Id.* at 999; *see infra* note 73 (discussion of proportionality as based on retribution and the Court's more expansive conception to include preventive goals).

[53] *Harmelin,* 501 U.S. at 1006. The Court emphasized that the prohibition of mandatory sentencing was limited to the death penalty context.

[54] *Harmelin* upheld a mandatory life sentence (precluding the opportunity to introduce mitigating evidence) for an adult offender. The Court distinguishes *Miller* from *Harmelin*, noting that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." Miller v. Alabama 132 S. Ct. 2455, 2470 (2012).

[55] I argue below that the objective comparative analysis of national legal trends played a smaller role in *Miller* than in the earlier cases. *See infra* Part I.D.

versus adults was even stronger than in *Roper*—with new brain research confirming and reinforcing the behavioral research cited in the earlier opinion.[56]

2. Juvenile LWOP and National Sentencing Norms

Graham and *Miller* went beyond previous adult death penalty cases in their reliance on the Court's independent proportionality analysis. Indeed, as the dissenting Justices explained in great detail, *Miller* gave little weight to national sentencing norms in assessing mandatory LWOP for juveniles.

In evaluating whether a death sentence constitutes excessive punishment under the Eighth Amendment, the Court typically (at least formally) has undertaken a two-part inquiry. One part is the independent proportionality review described above; the second is a determination of whether a national consensus holds the sentence to be excessive. In undertaking this inquiry, the Court has examined legislative trends and sentencing practices across jurisdictions to provide an external objective measure of contemporary norms.[57] These inquiries aim to evaluate whether the sentence offends "evolving standards of decency that mark the progress of a maturing society."[58] In theory, the review of national sentencing trends could be undertaken in a non-capital case as well, but the Court has made clear that this would be required only in the rare case in which the threshold requirement of "gross disproportionality" is first met.[59]

Modern scholars have found the "evolving standards of decency" test to be generally unsatisfactory and have leveled sharp (and legitimate) criticisms against the test and its application by the Court. First, skeptics have challenged the premise of the standard—that an advanced society moves inexorably toward more lenient sentences. This assumption is belied by late twentieth century sentencing policy.[60] Beyond this, the objective prong has been faulted on the ground that

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[56] Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (citing Brief for American Med. Ass'n et al. as *Amici Curiae* at 16–24, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412); Brief for American Psychological Ass'n et al. as *Amici Curiae* at 22–27, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412). *Miller* amplified this message. *See infra* note 88.

[57] *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (plurality opinion). This comparison sometimes extends to a comparison with sentencing practices in other countries. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 576 (2005) (citing to the United Nations Convention on the Rights of the Child and law in other countries to show that very few countries allowed the death penalty to be imposed for crimes committed by juveniles); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (noting that only three out of sixty major nations retained the death penalty for rape that did not result in death).

[58] Trop v. Dulles, 356 U.S. 86, 101 (1958) (describing evolving standards of decency standard); *see supra* note 27.

[59] *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (plurality opinion).

[60] *See infra* Part II.A.2. In his dissent in *Graham v. Florida*, Justice Thomas argued "the Court pretermits in all but one direction the evolution of the standards it describes, thus calling a constitutional halt to what may well be a pendulum swing in social attitudes and stunting legislative consideration of new questions of penal policy as they emerge." 130 S. Ct. 2011, 2045 (2010)

comparisons between the challenged sentence and national trends often seem strained and the inquiry sometimes appears to be outcome-driven.[61] But the comparative analysis has been defended as an effort to discern whether the sentence is problematic on grounds more substantial than that it offends a majority of Justices on the Supreme Court.[62] Under textbook Eighth Amendment doctrine, only if a sentence violates widely held societal norms about proportionate punishment should the Court override legislative choice and find it to be cruel and unusual punishment.

The Court has increasingly deemphasized this comparative analysis in the juvenile cases, relying instead on its independent proportionality assessment as the basis for rejecting harsh sentences. *Roper* evaluated legislative trends and sentencing practices regarding the juvenile death penalty and found a modest trend toward rejection of the sentence.[63] But the national consensus inquiry became less important in *Graham* and played almost no role in *Miller*. In *Graham*, for example, because many states authorized juvenile LWOP for nonhomicide offenses, the Court looked only to actual sentencing practices and concluded that the sentence was seldom imposed.[64] *Miller* virtually abandoned any effort to discern a national consensus, partly because the contested sentence was imposed relatively frequently due to its mandatory nature.[65] Instead the Court concluded

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(Thomas, J., dissenting) (citations omitted) (internal quotation marks omitted). Justice Thomas also noted that states have consistently increased the severity of sentences imposed on juveniles. *Id.* at 2050; *see also* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 919–20 (2011) (critiquing the standard and noting that "societal attitudes have become harsher and more punitive, not less so," so that under the evolving standards of decency test, courts are unable to overrule new punishments that ". . . enjoy public support, for the fact that they enjoy public support shows that they comport with current standards of decency.").

[61] Stinneford makes this point: "Because the punishments challenged before the Supreme Court usually involve divided societal opinion, application of the evolving standards of decency test rarely leads to a plausible decision to declare a punishment unconstitutional." *Id.* at 919.

[62] *See* Gregg v. Georgia, 428 U.S. 153, 174–76 (1976).

[63] Roper v. Simmons pointed to the states that had abolished the juvenile death penalty in the years since it had upheld the sentence for sixteen and seventeen year olds in *Stanford v. Kentucky*. Since *Stanford*, five states had abolished the death penalty for minors (four abolished it legislatively and one state rejected it by way of judicial decision). 543 U.S. 551, 564–65 (2005). The Court compared legislation prohibiting the juvenile death penalty with the trend abolishing the death penalty for mentally retarded persons. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (abolishing the death penalty for retarded persons).

[64] Graham v. Florida, 130 S. Ct. 2011, 2023 (2010). At the time, thirty-seven states authorized LWOP for juvenile nonhomicide offenders. However, only 109 juveniles were serving LWOP for nonhomicide crimes.

[65] In the twenty-nine states with mandatory LWOP statutes for homicide, challenged in *Miller*, all defendants convicted as adults of murder received the sentence; 2,500 prisoners serving LWOP were sentenced under these statutes for crimes committed as juveniles. The Court suggested that the statutory scheme did not reflect an explicit legislative judgment that the sentence was appropriate for juveniles, since juveniles became eligible for mandatory LWOP indirectly on the basis of their transfer to adult court. Miller v. Alabama, 132 S. Ct. 2455, 2459 (2012).

that LWOP was presumptively excessive for juveniles almost wholly on the basis of the scientifically-based analysis of attributes of adolescents that make juveniles less culpable and more likely to reform than adult offenders.

Not surprisingly, the dissenting Justices and other critics railed at what was viewed as flimsy evidence that the imposition of LWOP on juvenile offenders offended any objective standard of decency.[66] In *Graham*, the dissenters noted that a majority of states authorized LWOP for nonhomicide offenses committed by juveniles; they dismissed the small number of actual sentences as inadequate evidence of an emerging national consensus opposing LWOP. But the dissenting Justices expressed particular outrage in *Miller*, given the large number of individuals serving LWOP for homicides committed as juveniles.[67] Chief Justice Roberts also noted that mandatory LWOP statutes in fact were a relatively modern reform,[68] challenging the assumption that standards of decency evolve in the direction of ever more lenient criminal punishment.[69] In the view of critics, the juvenile opinions represent an illegitimate encroachment on legislative prerogative based on the subjective paternalistic judgment by the liberal Justices that juveniles should not be subject to harsh punishment.[70]

C. *Proportionality Analysis in a Developmental Framework*

Without question, the Court primarily relied on its independent proportionality assessment in its judgment that the challenged sentences represented cruel and unusual punishment for juveniles. But the criticism directed at the opinions underestimates the robustness of this analysis and the extent to which it provides an objective basis for the conclusion that juveniles deserve less punishment than their adult counterparts. This framework for analyzing juvenile

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[66] The dissenting justices also rejected the claim that a national consensus existed opposing the juvenile death penalty, given the small number of states that had repealed the sentence since *Stanford*. *See Roper*, 543 U.S. at 564.

[67] *Miller*, 132 S. Ct. at 2459.

[68] *Id.* at 2480 (Roberts, C.J., dissenting).

[69] *Id.* at 2478. John Stinneford criticizes the evolving standards of decency theory as being inappropriately focused on current public opinion and argues that courts should instead reject punishments that are "contrary to long usage" and thus inappropriately "unusual" under the Eighth Amendment. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1746–47, 1752–54 (2008).

[70] Richard Posner critiques the Justices' inability to act as "neutral experts" in *Roper* and accuses the Court of ignoring "both the evidence that contradicted their desired result and the limitations of the body of evidence that appeared to support that result." Richard Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 66 (2005). Justice Alito in his *Miller* dissent was particularly offended by the majority describing young criminals, including his hypothetical 17-½-year-old bomb thrower, as "children." *Miller*, 132 S. Ct. at 2487 (Alito, J., dissenting). Justice Thomas accused the majority of being overly subjective, arguing that "Eighth Amendment cases are no longer tied to any objective indicia of society's standards. Our Eighth Amendment case law is now entirely inward looking." *Id.* at 2490 (Thomas, J., dissenting).

culpability is far from a subjective assessment of proportionality based only on the personal views of the Justices, an approach the Court has sought to avoid in its deferential stance in reviewing adult non-capital sentencing. In the latter context, no clear baseline guides the judgment of whether a particular sanction is excessive: how long is too long?[71] But youths under the age of eighteen represent a delineated category of criminal actors. Developmental research clarifies that the factors that drive their criminal choices differentiate them from adult offenders. This is not to deny that there is some overlap between the categories; some juveniles may be indistinguishable from adults. But the attributes of adolescence that distinguish juveniles from adults are not only verified through a solid and growing body of research, they can also be linked to factors that have long been sources of mitigation in criminal law doctrine.[72] Moreover, the conclusion that juveniles, simply through maturation, are more likely to reform than adult criminals is also supported by substantial research, providing an independent basis for differential treatment under the Court's capacious definition of the justifications for punishment relevant to proportionality review.[73]

The Court focused on three dimensions of adolescence that distinguish juveniles from adult criminals and mitigate their blameworthiness. First, the Court pointed to developmental influences that impair juveniles' decision-making capacities, including their "inability to assess consequences"[74] and the "recklessness, impulsivity, and heedless risk-taking" that contribute to an "underdeveloped sense of responsibility."[75] These factors mitigate the culpability of youthful criminal choices under long-established doctrine.[76] Second, mitigation also applies to crimes committed in response to extraordinary external coercion.[77]

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[71] Solem v. Helm, 463 U.S. 277, 299 (1983).

[72] Laurence Steinberg and I have argued that the attributes of adolescence that make juveniles less culpable than their adult counterparts constitute conventional sources of mitigation in criminal law: diminished decisionmaking capacity; susceptibility to external coercion; and the absence of bad character. The Court's proportionality analysis was based on these features of adolescence, but it did not explicitly link them to criminal law mitigation doctrine. *See* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799 (2003); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

[73] Criminal law theorists generally view proportionality as a retributive principle and favor limiting punishment to that which the offender deserves, excluding consideration of the law's preventive purposes. Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 732 (2005). The Court however has expanded the rationales for punishment, allowing sentences to satisfy proportionality review if they can be justified on the basis of either retribution or prevention. Harmelin v. Michigan, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring) (plurality opinion).

[74] *Miller*, 132 S. Ct. at 2465.

[75] *Id.* at 2464.

[76] Courts have long recognized diminished decision making capacity based on age, mental disability, or mental illness as mitigating factors. *See* Scott & Steinberg, *supra* note 72, at 826.

[77] The defense of duress is a good example. *Id.* at 828.

This is relevant to juvenile offending because, as the Court explained, adolescents are vulnerable to negative pressures and influences, including peer influence, and have limited control over their environment or ability to extricate themselves from criminogenic settings.[78] Finally, the Court pointed to the unformed nature of adolescent character, noting that, because much of a juvenile's offending is the product of "transient immaturity," it is less likely than an adult's criminal conduct to be "evidence of irretrievable depravity."[79] In many states, and under the Federal Sentencing Guidelines, defendants can introduce mitigating evidence at sentencing to demonstrate that their criminal activity was not the product of bad character.[80] In short, the Court's conclusion that the harshest criminal sentences are actually or presumptively excessive for juveniles was firmly grounded in conventional criminal law doctrine—even though the Court did not explicitly link the key youthful attributes to specific mitigation sources. Its proportionality analysis was *not* based on the majority justices' subjective paternalistic inclinations toward youth.

The Court's conclusion that juveniles should not be subject to the harshest criminal sanctions was also based on its view that adolescents are more likely to reform than their adult counterparts. That most youthful criminal activity is based on "unfortunate yet transient immaturity"[81] is relevant to mitigation, as suggested above. But this feature of juvenile offending also indicates that the law's preventive purposes are often poorly served by lengthy criminal sentences. Most youths mature out of their tendency to get involved in criminal activity in early adulthood and, as the Court noted, it is very difficult to distinguish a youth whose crime follows this typical pattern from the uncommon young offender whose crime represents "irreparable corruption."[82] Thus sentencing a youth to LWOP cannot be justified on public protection grounds. Little social benefit is likely to derive from the sentence in most cases.

Both the retributive and preventive dimensions of the Court's proportionality analysis are supported by solid scientific research—not the typical judicial

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[78] *Miller*, 132 S. Ct. at 2464. Scott & Steinberg, *supra* note 72, at 818 (juveniles as legal minors are not free to leave their families, neighborhoods, etc.).

[79] Roper v. Simmons, 543 U.S. 551, 570 (2005).

[80] With mitigating character evidence, defendants effectively seek to rebut the inference that their criminal act was a product of bad character. Scott & Steinberg, *supra* note 72, at 827. Much adolescent criminal activity is the product of developmental influences and not of bad character. Personal identity is in flux in adolescence and doesn't settle until early adulthood. *Id.* at 834.

[81] *Miller*, 132 S. Ct. at 2469.

[82] *Roper*, 543 U.S. at 573, *quoted in* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010). The Court in *Roper* points to the American Psychiatric Association Diagnostic and Statistical Manual provides that the diagnosis of psychopathy cannot be made until age eighteen and concludes that "[i]f trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty." *Roper*, 543 U.S. at 573.

invocation of a few random studies to support a legal proposition. A large body of behavioral research confirms that adolescents are more impulsive, risk-seeking, subject to peer influence, and inclined to focus on the immediate consequences of their choices than are adults.[83] Moreover, as the Court noted, the evidence that adolescents are immature in ways that are relevant to their offending has become even more robust since *Roper*.[84] A growing body of developmental neuroscience research indicates that the areas of the brain that govern impulse control, planning, and foresight of consequences mature slowly over the course of adolescence and into early adulthood, while the arousal of the limbic system around puberty increases sensation seeking in early adolescence. This research provides a powerful hypothesis linking brain development to reckless antisocial behavior in teenagers.[85] Moreover, many studies find a similar pattern of adolescent offending, with the aggregate level of criminal involvement beginning at about age thirteen and increasing until age seventeen, followed by a sharp decline.[86] This age-crime trajectory confirms the transitory nature of most adolescent offending and supports the Court's judgment that juveniles are more likely to reform than their adult counterparts.

In sum, the Court's proportionality analysis in the juvenile cases provides a sound basis for its rejection of harsh sentences as excessive. The analysis is based not on conventional wisdom or "what any parent knows,"[87] but on developmental science. A comprehensive body of research supports the Court's conclusion that juveniles as a group differ from adults in ways that mitigate culpability because their offenses are driven by transitory developmental influences. The research, however, does not indicate that every youth deserves mitigation. Accordingly, individualized sentencing can be accommodated within the proportionality framework (though at a risk of error, which—at least at this point—the Court is ready to accept for youths convicted of murder). But the research justifies the

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[83] SCOTT & STEINBERG, *supra* note 5, at 130–39.

[84] *Miller* pointed to the explosion in developmental neuroscience research post-*Roper* which supported the analysis of both *Roper* and *Graham* about the diminished culpability of youth. *Miller*, 132 S. Ct. at 2464 n.5 (citing Brief for American Psychological Association et al. as *Amici Curiae* at 3).

[85] One scientist described the gap between increases in sensation seeking in early adolescence based on development in the brain's limbic system and the later development of executive control functions as "starting the engines with an unskilled driver." Ronald Dahl, *Affect Regulation, Brain Development and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 1, 69 (2001); *see also* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739 (2009) [hereinafter *Adolescent Brain Development*] (describing dimensions of brain development relevant to criminal offending); *see also* Richard Bonnie & Elizabeth Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, *in* CURRENT DIRECTIONS IN PSYCH. SCIENCE (2013).

[86] Alex Piquero, David Farrington & Alfred Blumstein, *The Criminal Career Paradigm: Background and Recent Developments*, 20 CRIME & JUST. 359 (Michael Tonry ed. 2003) (describing the age-crime trajectory).

[87] *See Miller*, 132 S. Ct. at 2464–66 (quoting *Roper*, 543 U.S. at 569).

Court's approach of designating juveniles as a special category of offenders under the Eighth Amendment, who presumptively should receive more lenient punishment than adult criminals.

D. Graham *and* Miller *and Eighth Amendment Doctrine: Two Competing Themes*

Graham and *Miller* broke new ground in Eighth Amendment doctrine. At this point, however, it is difficult to predict the scope of their influence—or whether the Court will impose further constitutional limits on legislative authority to punish juveniles as adults. Two related but distinct themes emerge in *Graham* and *Miller*: the first theme is that for juveniles, LWOP is like the death penalty. The second is that children are different. It is quite plausible that the Court, focusing on the first theme, will limit the scope of special Eighth Amendment protection for young offenders to restricting the sentence of LWOP. But if it takes the "children are different" principle seriously, the opinions may have a broader influence on constitutional doctrine.

The Court makes explicit the correspondence between LWOP and the death penalty in both *Graham* and *Miller*.[88] LWOP represents a "forfeiture that is irrevocable."[89] Post-*Roper*, it is the most severe sentence a juvenile can receive. Further, as *Graham* noted, juveniles serving LWOP effectively are subject to more severe sentences than their adult counterparts because they are likely to spend more time in prison. On the basis of the death-LWOP comparison, the *Graham* Court categorically banned LWOP as disproportionate for nonhomicide offenses—just as it had categorically excluded the death penalty for certain classes of offenses and offenders.[90] In *Miller*, the Court prohibited the mandatory imposition of LWOP on a juvenile offender and required that the decision be individualized so that the defendant could introduce mitigating evidence—the same protections afforded adult offenders facing a death sentence.[91] Under a narrow interpretation of *Graham* and *Miller*, the Court has simply extended the constitutional protections that apply to the death penalty to the non-capital sentence of LWOP for juveniles, because the two sentences are analogous for these young offenders. If this is the meaning of *Graham* and *Miller*, the Court's proportionality analysis may be extended to other LWOP challenges, but not to other sentences or to other special protections.

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[88] The Court emphasizes LWOP "share[s] some characteristics with death sentences that are shared by no other sentences" and that "this lengthiest possible incarceration is an especially harsh punishment for a juvenile because he will almost inevitably serve more years and a greater percentage of his life in prison than an adult offender." *Miller*, 132 S. Ct. at 2466 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010)) (internal quotations omitted).

[89] *Graham*, 130 S. Ct. at 2027.

[90] *Graham* represented the first time the Supreme Court categorically excluded a class of offenders from a non-capital offense. *Miller*, 132 S. Ct. at 2466–67.

[91] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

But a second theme also clearly emerged in *Miller*: that juveniles are a special category of offenders and that the attributes that make them different from adults are relevant to criminal punishment. The Court distinguished the mandatory sentence in *Miller* from a similar sentencing scheme for adults upheld in *Harmelin v. Michigan*,[92] reminding skeptics that it had held "on multiple occasions that a sentencing rule permissible for adults may not be so for children."[93] In announcing "if . . . death is different, children are different too"[94] under Eighth Amendment doctrine, *Miller* offered a powerful principle with potentially far-reaching impact. The Court's insistence that its proportionality analysis was *not* "crime-specific" is another strong statement that juvenile offending generally is less culpable than that of adults—and not simply when they engage in criminal conduct that carries a possible LWOP sentence. As Chief Justice Roberts observed, "[t]he principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive."[95]

This is a fair reading of *Miller*, although it seems unlikely that the Court will apply this principle as a constitutional constraint on sentencing juveniles as broadly as Chief Justice Roberts fears. But the principle that "children [or adolescents] are different" potentially has Eighth Amendment and other constitutional implications that extend beyond LWOP.[96] It may be invoked to challenge conditions of confinement,[97] the lack of educational and other developmentally important services in prison,[98] and the failure to assure that juveniles facing adult prosecution are competent to stand trial.[99] But even beyond its possible implications for expanding constitutional protections for juveniles,

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[92] Harmelin v. Michigan, 501 U.S. 957, 1006. (1991). The Court in *Harmelin* emphasized that death was unlike "all other penalties." *Id.* at 995.

[93] *Miller*, 132 S. Ct. at 2470.

[94] *Id.*

[95] *Id.* at 2482 (Roberts, C.J., dissenting).

[96] Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501 (2012).

[97] For example, the not-uncommon practice of putting juveniles in solitary confinement in adult prisons (which is particularly harmful on developmental grounds for juveniles) could be challenged on Eighth Amendment grounds. *Teens in Solitary Confinement*, HUMAN RIGHTS WATCH (Oct. 10, 2012), http://www.hrw.org/news/2012/10/10/us-teens-solitary-confinement.

[98] *See* JAMES AUSTIN, KELLY JOHNSON & MARIA GREGORIOU, U.S. DEP'T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT xi (2000) (finding "little evidence of efforts to customize programs for youthful offenders.").

[99] *See* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005) (describing how developmental immaturity affects youths' competence to stand trial).

Miller's symbolic importance is hard to exaggerate. To be sure, the opinions affect a relatively small number of offenders convicted of the most serious crimes. But our highest legal institution has emphatically rejected the approach to juvenile crime that dominated in the 1990s, when the relevance to criminal punishment of differences between juvenile and adult offenders was either ignored or denied. As I will show below, the principle announced by the Court, and the lessons amplified in *Miller* are likely to reverberate through the justice system and to profoundly influence other lawmakers.

II. CONSTITUTIONAL LESSONS FOR JUVENILE CRIME POLICY

The Supreme Court opinions rejecting harsh sentences for juveniles will not be universally embraced, of course, but they are not likely to be highly controversial in the contemporary political climate surrounding youth crime regulation. Indeed, the constitutional values that animated the opinions and the perspective the Court adopted can be discerned in contemporary political discourse on youth crime, and seem to be taking hold among lawmakers. The Court's Eighth Amendment opinions have imbued an emerging perspective on juvenile crime with constitutional significance, elevating its likely impact in the policy arena. But this perspective stands in sharp contrast to the view of teenage crime regulation that prevailed in the 1990s. Thus, the Supreme Court opinions are important in part because they so clearly repudiate the attitudes and policies of this relatively recent period.

In this Part, I will show that together with the general expressive importance of the Court's pronouncements as an influence on justice policy, four important and discrete lessons can be derived from the opinions: the first lesson is embodied in the principle that Chief Justice Roberts laments[100]—that adolescents are less culpable than adult offenders and presumptively should not be subject to the same punishment for their crimes. This principle challenges laws enacted in the 1990s that facilitated adult prosecution and punishment of juveniles. The second lesson, derived from *Miller*, provides guidance for regulating decisions about which youths should be eligible for adult prosecution and the process for making that determination. Traditional laws mandating an individualized transfer hearing in which the youth has a meaningful opportunity to present evidence of his immaturity are more compatible with constitutional values than recently enacted statutes that automatically transfer youths charged with serious crimes or give prosecutors broad discretion to try juveniles as adults.[101] Third, the Court's insistence that juveniles have greater potential for reform than do adult offenders

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[100] *See Miller*, 132 S. Ct. at 2482 (Roberts, C. J., dissenting).

[101] In New York, a thirteen-year-old charged with murder is defined as an adult and excluded from juvenile court jurisdiction. N.Y. PENAL LAW § 30.00 (McKinney 1994); *see also,* NAT'L. CENTER FOR JUV. JUST., http://www.ncjj.org/Research_Resources/State_Profiles.aspx (listing states with automatic transfer and direct file statutes).

offers constitutional support for a regime of dispositions that facilitate the development of juvenile offenders into non-criminal adults. And fourth, the opinions underscore that juvenile crime policy is appropriately grounded in developmental science, including neurobiological research on brain development—indeed, developmental knowledge reinforces the other three lessons.

The lessons grounded in the recent Supreme Court opinions may resonate with many lawmakers in the contemporary political climate, but they represent a repudiation of the juvenile justice regime that took hold in the late twentieth century. In the 1990s, public fear and anger directed toward young "superpredators" fueled moral panics in response to juvenile crime.[102] Politicians intent on protecting the public from the threat pushed urgently for tough laws, rejecting the traditional rehabilitative model of juvenile justice as well as the idea that adolescents were different from adults in any way relevant to the justice system's response to their crimes. Law reforms in almost every state facilitated adult prosecution and punishment of juveniles, often through automatic transfer statutes that categorically classified youths charged with particular serious crimes as adults.[103] The mantra of that period might well have been, "children are *not* different"—at least when it comes to criminal prosecution and punishment.[104]

The moral panics of the 1990s have subsided, and in recent years a more deliberative approach to juvenile crime has emerged. The change in attitude in part represents a pragmatic recognition that imprisonment of juveniles is costly and often less effective at reducing crime than developmentally-based correctional programs.[105] Concern about the fairness of punishing juveniles as adults has also created uneasiness with incarceration-based policies, especially because minority youths are far more likely to receive harsh sentences. In the past decade, developmental neuroscience research has captured public attention, persuading many that immature adolescent brains contribute to teenage criminal activity.[106] These factors have converged to create a political environment that is receptive to the lessons offered by the Supreme Court in the juvenile opinions.

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[102] *See* SCOTT & STEINBERG, *supra* note 5, at 95–96 for a discussion of the 1990s response to juvenile crime. The term 'superpredator' was coined by John DiIulio, who predicted a wave of violent crime committed by youths growing up in moral poverty. John J. DiIulio, Jr., *The Coming of the Superpredators*, THE WEEKLY STANDARD, Nov. 27, 1995.

[103] *See supra* note 101. Indeed, it was this expansion of transfer to adult court that resulted in many youths facing LWOP sentences under statutes such as those rejected in *Graham* and *Miller*. For a discussion of the reforms, see SCOTT & STEINBERG, *supra* note 5, at 96–99.

[104] In fact, the slogan "adult time for adult crime" was often invoked by punitive reformers. An early advocate of tough reforms, Alfred Regnery, head of the Office of Juvenile Justice and Delinquency Prevention under President Reagan, noted, "[T]here is no reason for punishing an offender less simply because he is sixteen." *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 POL'Y REV. 65, 68 (1987).

[105] *See generally* SCOTT & STEINBERG, *supra* note 5, at 184–91.

[106] Steinberg, *supra* note 85; Bonnie & Scott, *supra* note 85; SCOTT & STEINBERG, *supra* note 5 at 184–91.

This Part first sets the stage with a brief history of juvenile crime regulation over the past generation and then examines the four lessons offered by the Court. In combination, these lessons provide a template for fair and effective juvenile crime policy. The three Supreme Court opinions provide a solid foundation for a developmental model of juvenile crime regulation based on the premise that adolescents are different from adults in ways that mitigate culpability and that young offenders have a greater potential to reform.

A. *Juvenile Crime Regulation in Flux*

What follows is a brief history of a tumultuous period in juvenile crime policy. It begins with a description of the moral panics and the resulting punitive law reforms that transformed juvenile crime policy in the 1990s. It then describes factors that have led many policymakers to rethink this approach and have contributed to a climate more receptive to a regulatory approach that recognizes the differences between juveniles and adults. In this setting, the impact of the lessons offered by the Supreme Court is likely to be amplified.

1. Law Reform as Moral Panic

The legal and policy changes of the 1990s began in response to a legitimate concern: an increase in violent youth crime in the late 1980s.[107] Public alarm about this threat was reinforced by a widespread perception that the traditional juvenile justice system with its emphasis on rehabilitation was ineffective at dealing with violent youths and that tougher laws were needed.[108] As the media intensified its focus on juvenile crime and politicians responded with promises to protect the public, perceptions about the seriousness of the threat escalated and young criminals were demonized as predators; they came to be seen as the enemies of society.[109] Although high profile crimes by juveniles such as school shootings and the killing of innocent bystanders by juvenile gangs were rare occurrences, public alarm was fueled by media attention and exploited by politicians. Consequently, these incidents came to be seen as evidence of an epidemic of youth

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[107] *See generally* SCOTT & STEINBERG, *supra* note 5, at 96–99; FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (1998).

[108] In one study, seventy percent of those questioned believed that leniency in the juvenile justice system contributed to violent youth crime. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Kathleen Maguire & Timothy J. Flanagan eds., 1990). *See also* Jane B. Sprott, *Understanding Public Opposition to a Separate Juvenile System*, 44 CRIME & DELINQ. 399 (1998) (survey finding support for view that juvenile system's laxness encouraged youth crime).

[109] *See, e.g.*, Editorial, *Heading Off the Superpredators*, TAMPA TRIB., May 21, 1996, at 8 ("They are called suprepredators. They are not here yet but they are predicted to be a plague upon the United States in the next decade.").

violence.[110] In general, perceptions of the threat posed by young offenders became greatly exaggerated, with surveys indicating that the public erroneously thought that juveniles were responsible for *most* violent crime.[111] The perception that juvenile crime was on the rise and that an even greater threat loomed in the future only increased the sense of urgency; this perception persisted long after crime rates began a steady decline in 1994.[112] Protecting the public from teenage predators became an urgent priority for politicians, prosecutors and judges.

This was the social and political setting for sweeping law reforms that fundamentally altered youth crime regulation in almost every state. During this period, legislatures greatly expanded criminal court jurisdiction over young offenders in several ways. Judicial transfer laws were amended to allow adult prosecution of younger juveniles and the range of transfer-eligible crimes was greatly expanded to include less serious felonies, including property and drug offenses.[113] Two other reforms enacted by many state legislatures have had an even greater impact. First, automatic transfer statutes that set the jurisdictional age below the age of eighteen have excluded teenagers from juvenile court jurisdiction, either categorically (in states in which the general jurisdictional age is sixteen or seventeen) or when charged with particular felonies.[114] Estimates indicate that 250,000 youths under the age of eighteen are prosecuted and punished as adults under these statutes, half for non-violent crimes.[115] Second, in response to

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[110] *See, e.g.*, Rod Nordland, *Deadly Lessons*, NEWSWEEK, Mar. 9, 1992; Eloise Salholz, *How to Keep Kids Safe*, NEWSEEK, Mar. 9, 1992, at 30.

[111] A 1996 survey of 1,000 likely California voters found that sixty percent of respondents believed that juveniles were responsible for most violent crime. In reality, only fourteen percent of arrests for violent crimes involved juveniles. *See* Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, BUILDING BLOCKS FOR YOUTH at 3–4, 40 n.10 (2001), *available at* www.cclp.org/documents/BBY/offbalance.pdf (describing results of study).

[112] *See* Scott & Grisso, *supra* note 99 (discussing the popular prediction of a coming wave of "superpredators").

[113] In California today, youths age fourteen and older can be transferred for thirty offenses, including minor drug selling. CAL. WELF. AND INSTIT. CODE § 707 (West 2011). Under traditional law, transfer was rare and in most states, was reserved for teens age sixteen and older charged with serious violent crimes (e.g. murder, rape, kidnapping, aggravated assault). SCOTT & STEINBERG, *supra* note 5, at 98.

[114] For example, in Illinois, a fifteen year old charged with drug distribution near a school was treated as an adult. (This statute was repealed in 2005.) In two states (New York and North Carolina), the maximum age of juvenile court jurisdiction is age fifteen and in ten states, the maximum age is sixteen. NAT'L. CENTER FOR JUV. JUST., JUVENILE TRANSFER TO CRIMINAL COURT PROVISIONS BY STATE, *available at* http://www.ncjj.org/Research_Resources/State_Profiles.aspx. Richard Redding lists thirty-one states with automatic transfer statutes for some offenses in 2003. Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, OJJDP JUV. JUST. BULL. Jun. 2010, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.

[115] SCOTT & STEINBERG, *supra* note 5, at 4; CHARLES PUZZANCHERA, ET AL., OFF. JUV. JUST. & DEL. PREVENTION, JUVENILE COURT STATISTICS 2000, (2004) (citing statistics); In New York alone, almost 45,873 sixteen and seventeen year old youths were charged as adults in 2010. Mosi Secret, *New*

dissatisfaction with juvenile court judges, who were perceived to be too lenient, many states passed "direct-file" statutes that give prosecutors the authority to decide whether a youth charged with a serious crime should be dealt with as an adult or as a juvenile.[116] Under both automatic transfer and direct file laws, the jurisdictional question is no longer made in an individualized transfer hearing in which the youth's immaturity is considered. The reforms of the 1990s also had an impact on the operation of the juvenile system: dispositions became much harsher as incarceration became the norm for many youths who once would have received community sanctions.[117] In general, these legal reforms blurred the jurisdictional and functional boundaries between the juvenile and adult justice systems and they resulted in harsher criminal sanctions for many juveniles.[118]

The hostility and fear that characterized attitudes toward young offenders in the 1990s resulted in policies and decisions driven primarily by immediate public safety concerns and the goal of punishing young criminals. In this pressured environment, decisionmakers seldom considered the long term consequences of their choices, including the impact of imprisonment on recidivism and on the future trajectories of young offenders' lives. Moreover, values that would be deemed important to the legitimacy of the justice system in ordinary times got little attention—such as the disproportionate imposition of harsh sentences on minority youths or the fairness of subjecting teenagers to adult sentences.[119] The core assumption of the traditional model of juvenile justice—that young offenders were different from their adult counterparts and should receive different treatment—was largely dismissed.[120]

York Judge Seeks New System for Juveniles, N.Y. TIMES, (Sept. 20, 2011), *available at* http://www.nytimes.com/2011/09/21/nyregion/new-yorks-chief-judge-seeks-new-system-for-juvenile-defendants.html.

[116] NATIONAL OVERVIEWS, NAT'L. CENTER FOR JUV. JUST., *available at* http://www.ncjj.org; PATRICIA TORBET ET AL., OFFICE OF JUV. JUST. &DELINQ. PRESERVATION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME (1996), *available at* ncjrs.gov/pdffiles/statresp.pdf [hereinafter *State Responses*].

[117] *See* STEVE AOS, WASH. STATE INSTIT. FOR PUB. POL'Y, *The Juvenile Justice System in Washington State: Recommendations to Improve Cost-Effectiveness* 3 (Oct. 2002), *available at* http://www.wsipp.wa.gov/pub.asp?docid=02-10-1201 (describing increased use of incarceration in Washington state).

[118] For a general overview of the trend toward more punitive policies toward juveniles charged with violent crimes in the early 1990s, see TORBET ET AL., *supra* note 116, at 4.

[119] Substantial racial disparities begin with police contact. Minority youths are far more likely than white youths to be apprehended. *See, e.g.*, DAVID HUIZINGA, TERENCE THORNBERRY, KELLY KNIGHT & PETER LOVEGROVE, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM: A STUDY OF DIFFERENTIAL MINORITY ARREST/REFERRAL TO COURT IN THREE CITIES, (2007), *available at* http://www.ojjdp.gov/dmc/ (finding "clear evidence" of disproportionate minority contact with police).

[120] *See* Regnery, *supra* note 104 (expressing view that age of young offenders is irrelevant to criminal punishment).

2. A Twenty-First Century Perspective on Juvenile Crime

During the past decade, the tone of discourse about juvenile crime has changed and a different regulatory approach has begun to take hold. In part, this is because the moral panics of the 1990s subsided as the public gradually (and belatedly) recognized that juvenile crime was less of a threat than it had seemed to be.[121] Lawmakers also began to recognize that incarceration-based policies were costly; their budgetary impact became more burdensome with the severe recession in 2008. Just as importantly, policymakers have come to realize that incarcerating young offenders likely contributes to a high rate of reoffending, while some developmentally-based community programs have been shown to be very effective at reducing recidivism.[122] Since reducing crime through cost effective sanctions is a key goal of any criminal justice policy, over time these long-term practical considerations have dampened lawmakers' enthusiasm for harsh juvenile sentences.

At the heart of this change in attitude is a growing tendency among lawmakers and the public to accept (once again) that young offenders are different from adults. In part, this may be simply a resurfacing of traditional paternalistic attitudes toward youth that were submerged in the 1990s. But contemporary attitudes increasingly have been influenced by a body of developmental research that offers a far more sophisticated account of differences between adolescents and adults than was available in an earlier era. In particular, public and media interest has focused on neuroscience studies suggesting that immaturity in the brain's executive functions during adolescence may affect teenagers' decisions about involvement in criminal activity.[123] This research seems to have been influential in

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[121] Violent juvenile crime rates began a steady decade-long decline in 1994. Rates declined for other crimes shortly thereafter. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, *Juvenile Arrest Rate Trends* (Dec. 17, 2012), *available at* http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 ("The juvenile arrest rate for all offenses reached its highest level in the last two decades in 1996, and then declined thirty-six percent by 2009."); Charles Puzzanchera, OJJDP JUV. JUST. BULLETIN, *Juvenile Arrests 2008*, (Dec. 2009), *available at* www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf (describing declining rates for specific offenses).

[122] In 2009, a New York Task Force appointed by Governor Patterson issued a scathing critique of that state's juvenile justice system, pointing to the high recidivism rate among youths sent to institutional facilities. The report urged the use of evidence based community programs. TASK FORCE ON TRANSFORMING JUV. JUST., CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE (2009) [hereinafter CHARTING A NEW COURSE]. *See also* SCOTT & STEINBERG, *supra* note 5, at 217–20, for a discussion of successful programs.

[123] *See e.g.*, Sharon Begley, *Getting Inside a Teenage Brain*, NEWSWEEK, Feb. 28, 2000, at 58; Claudia Wallis, *What Makes Teens Tick?*, TIME, Sept. 26, 2008, at 56; Malcolm Ritter, *Experts Link Teen Brains' Immaturity, Juvenile Crime*, USA TODAY, Dec. 2, 2007, *available at* http://www.usatoday.com/tech/science/2007-12-02-teenbrains_N.htm.

changing attitudes about young offenders; it has been invoked in support of a broad range of policies dealing more leniently with juvenile offenders.[124]

The recognition that much juvenile offending differs from adult criminal activity in that it is driven by developmental immaturity challenges the punitive approach to juvenile crime in two ways. First, it supports the pragmatic critique of incarceration-based policies described above. Policymakers favoring a shift in resources from institutions to community-based programs have pointed to the particular harms to adolescents of imprisonment and to the greater effectiveness of developmentally appropriate correctional dispositions.[125] But accepting that teenagers are immature in ways that influence their criminal choices also challenges the *fairness* of prosecuting and punishing them as adults. While politicians in the 1990s dismissed the notion that adult punishment was disproportionate for juveniles, this concern has generated increased uneasiness in recent years. On occasion, the public has responded with sympathy to young offenders serving long sentences, leading to the moderation of harsh laws. In Colorado, for example, a series of news stories about youths serving LWOP sentences stirred opposition to this sentence; in response, the legislature abolished the sentence for juveniles altogether (even before the Supreme Court).[126] Fairness concerns have also become acute when the disproportionate impact of tough policies on minority youths is recognized. Thus, Illinois repealed a statute automatically transferring fifteen-year-olds charged with selling drugs near schools in the face of evidence that the statute was applied overwhelmingly against African American youths.[127] In short, two themes characterize the recent dissatisfaction with the justice policies of the late twentieth century—harsh criminal sentences imposed on juveniles represent disproportionate punishment, and they also are ineffective in furthering the long term goal of crime reduction. Both responses are based on the recognition that adolescents are different from adults.

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[124] For an overview, see SCOTT & STEINBERG, *supra* note 5, at 266–68; Bonnie & Scott, *supra* note 85.

[125] The 2009 New York Governor's Task Force report emphasized the high cost of institutionalizing youths ($210,000 per year, per youth), the majority of whom were misdemeanants, and their very high recidivism rates. The system's punitive approach, it stated, "damaged the future prospects of these young people, wasted millions of taxpayer dollars, and violated the fundamental principles of positive youth development." CHARTING A NEW COURSE, *supra* note 122, at 8. New York City officials responded by announcing a drastic reduction in the number of city youths sent to state institutions. Julie Bosman, *City Signals Intent to Put Fewer Teenagers in Jail*, N.Y. TIMES, Jan. 21, 2010, *available at* http://www.nytimes.com/2010/01/21/nyregion/21juvenile.html?ref=nyregion&pagewanted=print (describing a cost of $17,000 per youth for community program).

[126] *See* Gwen Florio, Sue Lindsey & Sarah Langbein, *Life for Death: Should Teen Murderers get a Second Chance at Freedom?*, ROCKY MTN. NEWS, Sept. 17, 2005, at 1A. Governor Bill Owen pointed to brain research in explaining his support. Miles Moffeit & Kevin Simpson, *Research Points to Changing Teen Brain*, DENVER POST, Feb. 19, 2006, at A1; Miles Moffeit, *Juvenile Justice Legislation a Milestone in Sentencing*, DENVER POST, May 28, 2006.

[127] MARY SCHMID, NATIONAL JUVENILE DEFENDER CENTER, 2005 STATE JUVENILE JUSTICE LEGISLATION (Nov. 2005), *available at* http://njdc.info/publications.php.

It would be an exaggeration to suggest that attitudes toward juvenile crime have been transformed in recent years or that lawmakers have retreated dramatically from the punitive model of regulation that dominated in the 1990s. The shifts in attitude and policy have been modest and gradual; many laws enacted in the 1990s remain on the books. But teenage lawbreakers are no longer labeled as superpredators in the political arena. Over the past decade, hostility toward young criminals has dissipated substantially, producing a climate in which lawmakers have been more inclined to deliberate and to consider long term goals and values as well as immediate concerns. In this environment, policymakers have adopted a more pragmatic and less punitive approach to juvenile crime regulation.

B. *Four Lessons for Youth Crime Policy*

These political and policy changes provide the backdrop for the Supreme Court's consideration of whether the imposition of harsh criminal sentences on juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment. The opinions discussed in this essay, with their emphasis on how distinctive features of adolescence are important to the legal response to youthful offending, embody a twenty-first century understanding of juvenile crime. In this way, the Court has effectively reinforced and strengthened the emerging legal trend and provided four key lessons for its future direction.

1. Lesson One: Fair Punishment and Proportionality

The first and broadest lesson offered by the Court is embodied in the mitigation principle lamented by Chief Justice Roberts in his *Miller* dissent—that juvenile offenders, due to their developmental immaturity, are less culpable than their adult counterparts and (usually) should be sentenced more leniently for their criminal offenses. The Court recognized that proportionality is essential to a constitutionally legitimate justice system and rejected sentences that are excessive on the basis of juveniles' reduced culpability. Moreover, the Court emphasized that this reduced culpability applies generally to juveniles' criminal offenses, implying that mitigation should broadly inform youth crime regulation. I have argued that the mitigation principle embraced by the Court is solidly grounded in the attributes of adolescence that distinguish youthful offending from that of adults and that correspond to various sources of mitigation in criminal law. In short, the first lesson is that a legitimate and fair justice system recognizes the reduced blameworthiness of this group of offenders and punishes them less severely than adults.

The Court, in announcing that "children are different" and creating a special Eighth Amendment status for juveniles, implicitly rebuked law reformers of the 1980s and 1990s who insisted that there was no reason that young offenders should

receive more lenient punishment than adults.[128] Indeed, in the hostile climate that surrounded youth crime during that period, teenage predators were depicted as *more* culpable and certainly more dangerous than adult criminals.[129] As legislatures executed sweeping legal changes that greatly expanded criminal court jurisdiction over juveniles, little (if any) attention was directed at whether adult sentences were excessive for juveniles. Conventional criminal law theory holds that proportionate punishment should be based on the seriousness of the harm but also on the blameworthiness of the criminal actor.[130] But the punitive reformers assumed that juveniles—like typical adult offenders—were sufficiently blameworthy to be punished solely on the basis of the harms of their offenses. By focusing on traits of young offenders that reduce their culpability, the Supreme Court rejected this assumption and the incomplete proportionality analysis on which it implicitly rested.

Although the first lesson—that juveniles presumptively should be punished more leniently than their adult counterparts—is unlikely to be fully entrenched in constitutional *doctrine*, it embodies constitutional values that can shape justice policy and practice in several ways. First, the mitigation principle supplies a rationale for retaining most juveniles in a separate justice system that systematically deals with offenders within its jurisdiction more leniently than does the criminal justice system. Traditionally, the juvenile and criminal systems were distinguished in part on the basis of the severity of sanctions in the two regimes—and this distinction continues to justify retaining a clear boundary between them.[131] The Court's proportionality analysis also supports a regime in which adult prosecution and punishment are "uncommon." Further, because (as the Court noted) the conclusion that a youth can fairly be subject to adult criminal punishment is subject to a high risk of error,[132] juveniles convicted in adult court presumptively should receive reduced sentences as compared to their adult counterparts. In theory, as Barry Feld has argued, proportionality values could be served in a unitary system in which youths were adjudicated in criminal court, but received a "youth discount" in sentencing in recognition of their reduced

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[128] *See* Regnery, *supra* note 104.

[129] *See* DiIulio, *supra* note 102 (describing "superpredators").

[130] For a discussion of the importance of the proportionality principle to criminal punishment, see RICHARD BONNIE, ANNE COUGHLIN, JOHN JEFFRIES & PETER LOW, CRIMINAL LAW 901–58 (2004).

[131] Of course, the leniency of the traditional juvenile court generated much criticism in the late twentieth century, *see* MAQUIRE & FLANAGAN, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 108, but this may have been because leniency was excessive or other justice system goals such as public protection and crime reduction received inadequate attention.

[132] The Court noted this high risk of error in distinguishing the youth whose crime is a product of immaturity from one who is "incorrigible" in categorically prohibiting the imposition of the death penalty and LWOP for nonhomicide offenses on juveniles. Graham v. Florida, 130 S. Ct. 2011, 2029 (2010); Roper v. Simmons, 543 U.S. 551, 572 (2005). *See* Scott & Steinberg, *supra* note 72, at 826 (discussing this challenge).

culpability.[133] But such a regime cannot be justified because it fails to serve other justice system values and goals, such as crime prevention.[134] Instead, only a small category of juveniles should be eligible for adult prosecution and, as indicated below, the judgment should be made on an individualized basis.

2. Lesson Two: Transfer and Eligibility for Adult Prosecution

The Court's second lesson for policymakers builds on the first: given that juveniles are presumptively less culpable than their adult counterparts, the decision about whether a particular youth will be tried as an adult should be made in a way that is compatible with constitutional values. Nothing in the Court's approach to the sentencing of juveniles supports excluding *all* juveniles from the criminal justice system. Indeed, the offenders in *Roper*, *Graham*, and *Miller* whose sentences were struck by the Court were imprisoned as adults, and most continued to serve prison terms after the decisions. But the lesson of these opinions for policymakers is that only youths charged with the most harmful felonies should be eligible for criminal court jurisdiction and that the decision should be made in an individualized hearing in which the court can consider the youth's immaturity and other mitigating factors.

This lesson is based on the distinction the Court draws between homicide and nonhomicide offenses in *Graham* and *Miller* and its insistence on individualized consideration of mitigation as a condition of imposing LWOP even for homicide. In prohibiting LWOP for nonhomicide offenses committed by juveniles, *Graham* emphasized both the generally reduced culpability of juveniles and the lesser harm of nonhomicide offenses. On these grounds, the Court excluded these offenses *categorically* from eligibility for the harsh sentence of LWOP. In contrast, *Miller* allowed the sentence of LWOP for murder because of the severe harm caused by the crime, but *only* on the basis of an individualized hearing to determine that the juvenile is sufficiently "corrupt" to warrant the sentence. Thus the Court recognized not only that certain crimes (murder) deserve more punishment than others because of the harm inflicted, but also that even those youths who have caused great harm usually will not deserve the same punishment as adults and should not be *categorically* subject to the same sanctions.

This framework can be applied more generally to regulate the transfer of juveniles to adult court. It argues for excluding juveniles from criminal court jurisdiction for all but the most harmful felonies: those that involve serious

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[133] BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 315–28 (1999) (arguing for a unitary system).

[134] *See* SCOTT & STEINBERG, *supra* note 5, at 226–29 (critiquing the unitary system and advocating for a separate juvenile justice system). A unitary system is unlikely to provide young offenders with programs and services needed to maximize the likelihood that they will make the transition to non-criminal adulthood. The staff, setting, and programs in a separate juvenile system are more likely to provide a healthy developmental setting. *See infra* notes 146–51 and accompanying text.

physical violence. It also supports a regime in which the decision to adjudicate a juvenile as an adult is made by a judge in an individualized transfer hearing.[135]

Laws adopted in the late twentieth century to redefine the jurisdictional boundary between juvenile and criminal court are not compatible with the Court's framework or the constitutional values on which it rests. During this period, as discussed above, statutory reforms greatly expanded the list of transfer-eligible crimes to include many non-violent offenses.[136] Statistics indicate that about half of youths in adult prisons are serving time for property or drug offenses.[137] Moreover, automatic transfer and direct file statutes eliminated any judicial determination that adult adjudication is appropriate for particular youths. These laws dramatically shift discretionary authority to make jurisdictional decisions from judges to prosecutors who are far less likely to consider youthful immaturity or other mitigating circumstances.[138] Finally, the general reduction in the minimum age of transfer[139] has increased the likelihood that immature and less culpable youths will face adult prosecution, an outcome that is offensive to the constitutional principle of proportionality.

The Supreme Court's framework for protecting youths whose crimes and/or immaturity do not warrant harsh criminal punishment supports a regulatory approach similar to the traditional transfer regime that regulated decisions about criminal court adjudication of juveniles in most states for much of the twentieth century.[140] Under these statutes, transfer typically was limited to older juveniles charged with serious violent offenses. The decision was made by a judge in a hearing in which the court considered evidence of immaturity and other factors such as the youth's amenability to treatment as a juvenile, his criminal record, and the circumstances of (and his role in) the crime.[141] Only on the basis of this deliberative process was a juvenile transferred to criminal court to be tried as an adult. This statutory model can guide modern lawmakers in designing a transfer process compatible with the constitutional values embedded in the Court's recent juvenile sentencing opinions.

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[135] In *Kent v. United States*, the Supreme Court found that juveniles were entitled to a waiver hearing before they were transferred to criminal court. The Court was interpreting the District of Columbia statute, but the language of the opinion suggested that the waiver decision implicated constitutional interests. 383 U.S. 541 (1966).

[136] For example, in California, youths age fourteen and older can be transferred for thirty offenses, including minor drug selling. CAL. WELF. AND INSTIT. CODE § 707 (West 2011).

[137] SCOTT & STEINBERG, *supra* note 5, at 98.

[138] NAT'L. CENTER FOR JUV. JUST., STATE JUVENILE JUSTICE PROFILES: NATIONAL OVERVIEWS, *available at* http:www.ncjj.org; TORBET ET AL., *supra* note 115.

[139] SCOTT & STEINBERG, *supra* note 5, at 345 n.33.

[140] *See generally id.* at 84 (describing the traditional juvenile court prior to the punitive reforms of the 1990s).

[141] *See* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1006–09 (1995).

3. Lesson Three: Juveniles' Potential to Reform

As discussed above, the Court bolstered its retributive analysis of LWOP as an excessive sentence for juveniles with a preventive rationale—that young offenders have a greater potential to reform than their adult counterparts and that LWOP affords them no opportunity for rehabilitation.[142] The importance assigned to the potential of youths to desist and reform points to a third important lesson for justice policy: as the Court emphasizes, most juveniles who engage in criminal activity are not "incorrigible" (i.e., they are *not* on an inexorable course to a life of criminality). Their criminal activity is driven by factors associated with adolescence as a developmental stage. As youths mature, these developmental influences on decisionmaking diminish and the capacity for self control improves. As the Court explained in *Miller*, "as . . . neurological development occurs, [the young offender's] deficiencies will be reformed."[143] Thus, most juveniles are likely to desist from offending as they mature into adulthood[144]—unless the justice system pushes them in the direction of a criminal career. For this reason, society has an interest in responding to juvenile crime through interventions that maximize the likelihood that young offenders will actually mature into non-criminal adults. An effective justice policy will provide dispositional settings and programs for juveniles that promote healthy maturation during adolescence.

In emphasizing the potential of young criminals to reform as they mature, the Court again implicitly rejected policies adopted in the 1990s that aimed to promote public safety by incarcerating young criminals in prisons and institutional juvenile facilities. Punitive reformers either did not understand the transitory nature of most youthful offending or did not draw the clear policy lesson that correctional settings matter if crime reduction is an important goal. Considerable evidence indicates that institutions are harmful developmental settings due to a combination of features: large size, impersonal relationships between inmates and adult staff,[145]

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[142] *See supra* note 73 (explaining the Court's position that a sentence can be justified as not disproportionate if it serves other purposes of criminal punishment such as deterrence, incapacitation, or rehabilitation). Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (plurality opinion).

[143] Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (internal quotations omitted).

[144] Piquero et. al., *supra* note 86, at 359 (between five and ten percent become adult career criminals).

[145] Staff in prisons and institutional facilities are unlikely to function as positive adult role models. They typically perform custodial functions, maintaining distant, authoritarian, and generally hostile relationships with inmates. Martin Forst, Jeffrey Fagan & T. Scott Vivona, *Youths in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1 (1989); Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 227 (Jeffrey Fagan & Frank Zimring eds., 2000) (describing staff-inmate relationships in prisons).

unstructured interactions with fellow inmates,[146] and inadequate educational, mental health, and occupational programs.[147] These facilities do little to provide adolescents with the structures and services necessary to enable them to make the transition to the conventional roles of adult life.[148] Lawmakers in the late twentieth century focused intently on the immediate threat posed by young criminals and paid little attention to the long term consequences of imprisonment on juveniles' lives, or perhaps they erroneously assumed that most young offenders *were* incipient career criminals. Further, the 1990s' reforms swept into secure facilities many youths whose crimes involved no violence and who posed little threat to public safety.[149] Not surprisingly, recidivism rates among these juveniles were (and are) high.[150]

Contemporary policy makers have begun to understand that much teenage crime is driven by developmental influences, and to embrace the lesson that justice policy should attend to juvenile offenders' potential for reform. Incarceration-based policies have been subject to harsh criticism lately because they are costly, ineffective at reducing reoffending, and destructive of young offenders' future lives.[151] Across the country, regulators have shifted resources from state institutions to evidence-based community programs that have been shown to be far more effective than institutional placement at reducing reoffending.[152] These programs incorporate developmental knowledge to create social contexts that facilitate healthy maturation in adolescence by seeking to build relationships with authoritative parents or other adults, minimize the influence of antisocial peers,

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[146] In most adult facilities, youths have frequent contact with older prisoners, who may teach them criminal strategies or victimize them. JAMES AUSTIN, KELLY JOHNSON & MARIA GREGORIOU, U.S. DEP'T OF JUST. JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT (2000) (juvenile and adult prisoners separated in thirteen percent of facilities). In some youth prisons, juveniles confined for minor crimes mix freely with serious chronic offenders. CHARTING A NEW COURSE, *supra* note 122, at 19, 47 (describing misdemeanants and violent youths mixed in institutional facilities).

[147] *Id.* at 57–62.

[148] Indeed institutional incarceration may be more aversive for adolescents than for older prisoners because teenagers are in a formative developmental stage.

[149] *See, e.g.*, HOWARD N. SNYDER & MELISSA SICKMUND, OFF. OF JUV. DELINQ. PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT115 (fifty percent of youths in prison convicted of property and drug offenses).

[150] CHARTING A NEW COURSE, *supra* note 122.

[151] *Id.*

[152] Among the most successful programs are Multi-Systemic Therapy, Functional Family Therapy, and Therapeutic Foster Care. See discussion of these programs, how they function to provide healthy social contexts and their effectiveness in SCOTT & STEINBERG, *supra* note 15, at 215–21; *see also* STEVE AOS, MARNA MILLER & ELIZABETH DRAKE, EVIDENCE- BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006), *available at* http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf (showing cost effectiveness of these programs).

and provide appropriate training and educational services.[153] Contemporary lawmakers increasingly recognize that juveniles have the "potential to reform," and that prison sentences may be counterproductive in furthering society's goal of reducing crime.

The Supreme Court's emphasis on the transitory nature of much juvenile offending reflects an understanding of youth crime that aligns with (and has probably influenced) that of contemporary regulators. This understanding in turn tracks scientific knowledge about the pattern of criminal involvement in adolescence and theories about its causes. Clear policy implications follow from the recognition that much youthful offending is driven by developmental influences. The Court has not drawn out these implications through specific policy proposals, of course. But in emphasizing the potential of the young offender to reform and rejecting LWOP as offensive to the Eighth Amendment for failing to provide that opportunity, while "mak[ing] an irrevocable judgment about that person's value,"[154] the Court lent moral authority to a correctional approach that assumes that reform is a key policy goal and aims to maximize young criminals' prospects for non-criminal adulthood. The Court's endorsement has underscored the superiority of this approach and bolstered it as the path forward on both pragmatic and moral grounds.

4. Lesson Four: Developmental Science and Juvenile Crime Policy

The last lesson offered by the Court in the juvenile sentencing cases overlaps with and informs the first three lessons. The opinions clarify that developmental science can play an important role in informing the legal response to youth crime. Developmental psychology and neuroscience references were not window dressing in the Court's analysis. The scientifically informed account of adolescent offending is at the heart of its proportionality analysis and it is the primary basis for rejecting the death penalty and LWOP as excessive punishment for juveniles. This understanding of juveniles' involvement in crime also forms the basis of the important policy lessons I have described. But the point can be generalized further: the Court's final lesson is that scientific knowledge about adolescence and teenage involvement in crime provides a framework for the formulation of youth crime policies that are fair to young offenders and likely to reduce reoffending.

In grounding its analysis in developmental knowledge, the Court created a special status for juveniles in the justice system that rests on a firmer foundation than the traditional basis for paternalistic justice policies. Underscoring this point,

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[153] Most successful programs seek to involve delinquents' parents and to guide them in performing their role effectively. If this is not possible, program staff, teachers, or foster parents, can function as adult role models. SCOTT & STEINBERG, *supra* note 5, at 215–21 (describing effective programs using this approach). Multi-Systemic Therapy also provides youths with tools to avoid the influences of antisocial peers. *Id.*

[154] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

Justice Kagan in *Miller* emphasized that the Court's conclusion that juveniles are different from adults in ways that are relevant to proportionality was *not* based on conventional wisdom or what "any parent knows,"[155] but on a substantial and growing body of scientific research. This announcement confirmed the Court's conviction that in this context, constitutional doctrine can usefully and legitimately be informed by scientific knowledge, precisely because developmental research is sound and provides insight relevant to the legal question of whether sanctions that are permitted for adult criminals are excessive as applied to juveniles.

Modern policymakers also increasingly understand that developmental psychology and neuroscience research is relevant to the core issues that must be addressed in formulating policies that are fair to young offenders and promote social welfare.[156] Research informs our understanding of the developmental factors that contribute to adolescent offending and is beginning to clarify how changes in brain structure and functioning may be linked to increased offending in early and mid-adolescence and to desistance as teenagers mature.[157] Of perhaps more direct practical relevance, research on the relationship between social context and healthy psychological maturation has contributed to the development of programs that can provide youths with the skills and competencies needed to negotiate the transition to adult life.[158] Policy makers allocating juvenile justice resources have also relied on empirical studies evaluating the effectiveness of these programs. Finally, responding to research demonstrating that juveniles are less competent to function as defendants in criminal proceedings, lawmakers have introduced procedures to reduce the disadvantages of immaturity.[159]

In general, there has been substantial movement over the past decade toward juvenile crime regulation grounded in scientific knowledge. Moreover, with the growing attention to adolescent brain science, this trend has generated public interest and support. This is not to say that the sole concern of lawmakers or the public is to further the welfare of young offenders. Promoting public safety and holding offenders accountable continue to be top priorities of justice policy, and

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[155] Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

[156] An important catalyst in promoting the importance of developmental science to justice policy was the work of the John D. and Catherine T. MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice over a ten year period from 1996 to 2006. I was a member of this Network which, under the leadership of developmental psychologist Laurence Steinberg, undertook important research on the competence and culpability of adolescents as compared to adults. In our 2008 book, Steinberg and I offered a developmental framework for juvenile justice policy. *See generally* SCOTT & STEINBERG, *supra* note 5. For a discussion of the Network's contributions, see Robert G. Schwartz, *Age-Appropriate Charging and Sentencing*, 27 CRIM. JUST. 49 (Fall 2012).

[157] B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 20 DEV. REV. 62 (2008); Bonnie & Scott, *supra* note 85.

[158] Laurence Steinberg, He Len Chung & Michelle Little, *Reentry of Young Offenders from the Justice System: A Developmental Perspective*, 2 YOUTH VIOLENCE & JUV. JUST. 21 (2004).

[159] *See supra* note 115 and accompanying text.

sometimes may override other concerns. But lawmakers increasingly accept that these interests often are furthered most effectively through developmentally based policies.

The account of typical teenage offenders as immature adolescents "whose crimes reflect unfortunate but transient immaturity"[160] is a far cry from the image of remorseless superpredators that prevailed in the 1990s. The Court's embrace of developmental science signals its rejection of that ominous narrative and its commitment to a normative account of adolescence that tracks empirical reality. This move is compatible with the inclinations of modern policy makers and reinforces an approach to youth crime regulation that has emerged in the early twenty-first century.

CONCLUSION

In a relatively brief period, three Supreme Court opinions have substantially expanded Eighth Amendment protections for juveniles convicted as adults of serious crimes. The Court has broken new ground and announced a constitutional principle with potentially far reaching implications: "children are different." At this point it is not clear whether the Court will apply the principle to further enhance juveniles' special constitutional status. But it is clear that the Court has issued a forceful statement about the differences between adolescent and adult criminals and the importance to legal regulation of recognizing those differences. This statement and the perspective on juvenile offending embodied in the opinions reinforce attitudes emerging in the past decade and are likely to be influential in shaping the direction of juvenile crime policy going forward. In a period in which lawmakers are open to rethinking the punitive and costly policies adopted in the late twentieth century, the Court has offered several useful lessons that together can shape a new wave of law reforms in the twenty-first century. A legal regime that incorporates the Court's lessons will punish youths less severely than adults, individualize transfer decisions, attend to the developmental impact of sanctions, and generally draw on scientific knowledge about adolescence to inform regulation. This approach is both fairer to young offenders and more likely to reduce the social cost of youth crime than the harsh policies of the 1990s.

[160] *Miller*, 132 S. Ct. at 2469 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).